

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

MYESHA PRATHER,

Plaintiff,

VS.

DR. VINCENT MIRKIL MD, *et al.*,

Defendants.

Case No.: 2:17-cv-00183-GMN-VCF

## ORDER

Before the Court is Plaintiff Myesha Prather’s (“Plaintiff’s”) Amended Complaint, (ECF No. 5). The Amended Complaint was referred to United States Magistrate Judge Cam Ferenbach for screening pursuant to 28 U.S.C. § 1915(e)(2). (R&R, ECF No. 7). On March 15, 2017, Judge Ferenbach entered the Report and Recommendation (“R&R”), which recommends that the Court dismiss the Amended Complaint with prejudice. (*Id.* 1:10–12). Plaintiff timely filed an Objection, (ECF No. 8). For the reasons discussed below, the Court **DENIES** Plaintiff’s Objection and **ADOPTS** the R&R in full.

## I. BACKGROUND

This case arises from Plaintiff’s allegations that she suffered race and disability discrimination while with her children at an urgent care center after requesting “Plan B,” a contraceptive pill. On January 23, 2017, Plaintiff, proceeding *pro se*, commenced this action by filing an application for leave to proceed *in forma pauperis* and an accompanying Complaint against Defendants HCA Far West Division and Dr. Vincent Mirkil, M.D. (“Mirkil”) (collectively, “Defendants”). (App. Leave Proceed *in forma pauperis*, ECF No. 1); (Compl., ECF No. 4). Plaintiff’s Complaint alleged various state law tort claims in addition to violations of Plaintiff’s civil rights under Title II of the Civil Rights Act of 1964 and Title III of the Americans with Disabilities Act (“ADA”). (Compl. at 4–6). Judge Ferenbach entered an Order

1 and R&R, which granted Plaintiff's application for leave to proceed *in forma pauperis* but  
2 recommended that the Court dismiss the Complaint with leave to amend for failing to state a  
3 claim upon which relief could be granted. (*See* Order and R&R, ECF No. 3). The R&R  
4 provided Plaintiff guidance on how to amend the Complaint to raise plausible claims. (*See id.*  
5 3:10–4:12). The Court adopted the R&R in full. (Order, ECF No. 6).

6 Following Judge Ferenbach's initial R&R, Plaintiff filed the Amended Complaint,  
7 which asserts claims for violations of Plaintiff's civil rights under § 1557 of the Patient  
8 Protection and Affordable Care Act, Title VI of the Civil Rights Act of 1964, § 504 of the  
9 Rehabilitation Act, and Title II of the ADA, in addition to various state law tort claims. (*See*  
10 Am. Compl. at 1, ECF No. 5). Judge Ferenbach now recommends that the Court dismiss the  
11 Amended Complaint with prejudice because Plaintiff failed to cure the Complaint's  
12 deficiencies as outlined in the previous R&R. (R&R 2:23–18, ECF No. 7).

## 13 **II. LEGAL STANDARD**

14 A party may file specific written objections to the findings and recommendations of a  
15 United States Magistrate Judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);  
16 D. Nev. R. IB 3-2. Upon the filing of such objections, the Court must make a *de novo*  
17 determination of those portions to which objections are made. *Id.* The Court may accept, reject,  
18 or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge.  
19 28 U.S.C. § 636(b)(1); D. Nev. IB 3-2(b).

## 20 **III. DISCUSSION**

21 The R&R contends that the Court should dismiss Plaintiff's Amended Complaint with  
22 prejudice because Plaintiff has failed to cure the deficiencies of the Complaint and further  
23 amendment would be futile. (R&R 3:4–18, ECF No. 7). Plaintiff objects, arguing that her  
24 Amended Complaint states a plausible claim for relief. (Obj., ECF No. 8). Alternatively, she  
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1 argues that she should be given leave to amend. (*Id.*) For the reasons discussed below, the  
2 Court denies Plaintiff's Objection and adopts the R&R in full.

3 A court reviews the complaint of a plaintiff proceeding *in forma pauperis* pursuant to  
4 Federal Rule of Civil Procedure 8. *Erickson v. Pardus*, 441 U.S. 89, 93–94 (2007). Rule 8  
5 requires that the complaint contain “a short and plain statement of the claim showing that  
6 [plaintiff] is entitled to relief.” Fed. R. Civ. P. 8(a)(2). To survive dismissal, the complaint  
7 “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
8 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*  
9 *Twombly*, 550 U.S. 544, 555 (2007)). “A claim has facial plausibility when the plaintiff pleads  
10 factual content that allows the court to draw the reasonable inference that the defendant is liable  
11 for the misconduct alleged.” *Id.* This standard “asks for more than a sheer possibility that a  
12 defendant has acted unlawfully.” *Id.* Legal conclusions couched as factual allegations are  
13 insufficient. *Twombly*, 550 U.S. at 555. Nevertheless, “a pro se complaint, however inartfully  
14 pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”  
15 *Erickson*, 551 U.S. at 94 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). If the  
16 complaint is insufficiently pleaded, the court should generally provide the plaintiff leave to  
17 amend with directions to cure the complaint's deficiencies unless it is clear from the face of the  
18 complaint that the deficiencies could not be cured by amendment. *Cato v. United States*, 70  
19 F.3d 1103, 1106 (9th Cir. 1995).

20 The Court begins its analysis with Plaintiff's race-discrimination claims. Plaintiff raises  
21 claims under Title VI of the Civil Rights Act of 1964 (“Title VI”) and § 1557 of the Patient  
22 Protection and Affordable Care Act (“ACA”). (Am. Compl. at 1). To state a claim under Title  
23 VI, a plaintiff must allege: “(1) the entity involved is engaging in racial discrimination; and (2)  
24 the entity involved is receiving federal financial assistance.” *Fobbs v. Holy Cross Health Sys.*  
25 *Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994) (overruled in part on other grounds). Alleging racial

1 discrimination requires the complaint to plead facts supporting a reasonable inference that  
2 defendants' purported misconduct was racially motivated. *See Marks v. Santa Rosa City Sch.*,  
3 748 Fed. Appx. 159, 160 (9th Cir. 2019). A race-discrimination claim under the ACA has the  
4 same elements as a Title VI claim. *See* 42 U.S.C. § 18116(a).

5 In the Amended Complaint, Plaintiff alleges, "I believe [Mirkil] thought I was  
6 incompetent based on my race and disability." (Am. Compl. at 2). She further alleges, "I  
7 believe if I would have been white" Mirkil would not have asked Plaintiff to explain what Plan  
8 B is. (*Id.*) The R&R recommends dismissal of Plaintiff's race-discrimination claims because  
9 Plaintiff has again failed to allege facts indicating she was discriminated against because of her  
10 race, and instead she continues to allege only speculative conclusions about Mirkil's  
11 motivations. (R&R 3:4–10).

12 The Court agrees. Judge Ferenbach's initial R&R identified the Complaint's claims as  
13 deficient because they were based on speculation rather than factual allegations. (Order and  
14 R&R 3:10–4:3). The Court adopted the R&R. (*See* Order, ECF No. 6). Here, Plaintiff only  
15 alleges how she feels she would have been treated had she been white, not facts indicating  
16 Mirkil discriminated against her because she is African American. (*See* Am. Compl. at 2).  
17 Plaintiff's failure to cure the Complaint's deficient factual pleading, in addition to continuing to  
18 rely exclusively upon her subjective beliefs, indicate she cannot plead facts raising a plausible  
19 race-discrimination claim against Defendants. Accordingly, the claims are dismissed with  
20 prejudice.

21 The Court next considers Plaintiff's disability discrimination allegations. Plaintiff's  
22 Amended Complaint asserts claims under Title II of the ADA ("Title II"), § 504 of the  
23 Rehabilitation Act of 1973 (the "Rehabilitation Act"), and ACA § 1557. (Am. Compl. at 1). In  
24 order to state a Title II claim, a plaintiff must allege: "(1) he 'is an individual with a disability;'  
25 (2) he 'is otherwise qualified to participate in or receive the benefit of some public entity's

1 services, programs or activities; (3) he ‘was excluded from participation in or denied the  
2 benefits of the public entity’s services, programs, or activities, or was otherwise discriminated  
3 against by the public entity;’ and (4) ‘such exclusion, denial of benefits, or discrimination was  
4 by reason of [his] disability.’” *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir.  
5 2007) (internal quotations and modifications original) (quoting *McGary v. City of Portland*,  
6 386 F.3d 1259, 1265 (9th Cir. 2004)). A plaintiff is disabled within the meaning of the ADA  
7 by having either: (1) “a physical or mental impairment that substantially limits one or more of  
8 the major life activities of such individual;” (2) “a record of such an impairment;” or (3) is  
9 “regarded as having such an impairment.” 42 U.S.C. § 12102(2). “The Rehabilitation Act is  
10 materially identical to and the model for the ADA, except that it is limited to programs that  
11 receive federal financial assistance.” *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 908 (9th Cir.  
12 2013) (internal quotations omitted) (quoting *Armstrong v. Davis*, 275 F.3d 849, 862 n.17 (9th  
13 Cir. 2001)). Disability discrimination claims under the ACA contain the same elements as such  
14 claims under the Rehabilitation Act. *See* 42 U.S.C. § 18116(a).

15         The Amended Complaint alleges that Plaintiff’s disability is anxiety; Mirkil “was aware  
16 of [her] disability;” and Mirkil “thought [Plaintiff] was incompetent because of [her] . . .  
17 disability.” (Am. Compl. at 2–3). Specifically, Plaintiff alleges that Mirkil would not have  
18 prescribed any patient Plan B, but Plaintiff argues her race and disability led Mirkil to ask  
19 Plaintiff to explain Plan B in an attempt to embarrass her in front of her children. (*Id.* at 2). The  
20 R&R recommends dismissal of Plaintiff’s disability discrimination claims with prejudice  
21 because Plaintiff has not cured the deficiencies identified in the previous R&R. (R&R 3:11–  
22 15). The R&R explains that Plaintiff has neither alleged that anxiety is a qualifying disability  
23 under the ADA and the Rehabilitation Act, nor that she was denied services because of her  
24 disability. (*Id.*)

1 The Court finds that Plaintiff has failed to cure the deficiencies in her Complaint and  
2 amendment would be futile. Plaintiff again fails to allege that anxiety is a qualifying disability  
3 under the ADA. Plaintiff also fails to allege she was denied services because of her disability;  
4 rather, she only argues that Mirkil treated her rudely because Mirkil perceived her as  
5 “incompetent.” (*Id.* 2–3). The allegation cannot support a claim for disability discrimination  
6 resulting from Plaintiff’s alleged anxiety. Given that Plaintiff has failed to cure the deficiencies  
7 highlighted in Judge Ferenbach’s first R&R, and it appears Plaintiff cannot plead facts  
8 indicating Defendants denied her services on the basis of her alleged disability, the Court  
9 dismisses Plaintiff’s disability discrimination claims with prejudice.

10 Plaintiff’s remaining claims arise under state law. (Am. Compl. at 1, 4). Plaintiff  
11 concedes that the Court relies on its supplemental jurisdiction to hear the claims because  
12 Plaintiff and Mirkil are citizens of Nevada. (*Id.* at 1). Given that the Court has dismissed  
13 Plaintiff’s federal claims, the Court declines to exercise supplemental jurisdiction over the  
14 remaining state-law claims. *See* 28 U.S.C. §1367(c)(3).

15 **IV. CONCLUSION**

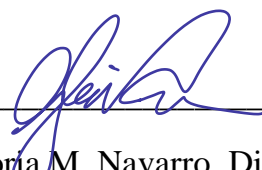
16 **IT IS HEREBY ORDERED** that the Report and Recommendation, (ECF No. 7), is  
17 **ACCEPTED** and **ADOPTED** in full.

18 **IT IS FURTHER ORDERED** that Plaintiff’s Objection, (ECF No. 8), is **DENIED**.

19 **IT IS FURTHER ORDERED** that the Amended Complaint, (ECF No. 5), is  
20 **DISMISSED with prejudice**.

21 The Clerk of Court shall close the case.

22 **DATED** this 14 day of April, 2020.

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Gloria M. Navarro, District Judge  
United States District Court